

ESTTA Tracking number: **ESTTA454882**

Filing date: **02/06/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77819705
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Applied for Mark	SCORED NOVELLA
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Submission	Reply Brief
Attachments	replybrief.PDF (15 pages)(526798 bytes)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Applicant : J. Patrick Berry

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Serial No. : 77/819,705

Serial No. : 77/834,679

Mark : **SCORED NOVELLA**

Mark : **SCORED SHORT STORY**

Filed : September 3, 2009

Filed : September 25, 2009

Our Ref. : 006910.4853

Our Ref. : 006910.4862

Applicant : J. Patrick Berry

Applicant : J. Patrick Berry

Serial No. : 77/834,681

Serial No. : 77/834,686

Mark : **SCORED STORY**

Mark : **SCORED NOVEL**

Filed : September 25, 2009

Filed : September 25, 2009

Our Ref. : 006910.4863

Our Ref. : 006910.4864

APPLICANT'S CONSOLIDATED REPLY BRIEF

TABLE OF AUTHORITIES

CASES	Page(s)
<u>In re Bayer Aktiengesellschaft,</u> 488 F.3d 960, 82 U.S.P.Q.2d 1828 (Fed. Cir. 2007)	3
<u>In re Colonial Stores Inc.,</u> 394 F.2d 549, 157 U.S.P.Q. 382 (C.C.P.A. 1968)	3
<u>In re Distrib. Codes, Inc.,</u> 199 U.S.P.Q. 508 (T.T.A.B. 1978)	12
<u>In re Elgin Sweeper Co.,</u> Ser. No. 77/193,259 (T.T.A.B. Mar. 26, 2009)	8
<u>In re Grand Metro. Foodservice, Inc.,</u> 30 U.S.P.Q.2d. 1974 1976 (T.T.A.B. 1994)	12
<u>In re King Koil Licensing Co.,</u> 79 U.S.P.Q.2d 1048 (T.T.A.B. 2006)	8
<u>In re Las Nuevas Fabricas, S.A. de C.V.,</u> Ser. No. 77/193,535 (T.T.A.B. May 19, 2009)	6, 11
<u>In re Oldcastle Glass, Inc.,</u> Ser. No. 76/372,028 (T.T.A.B. Apr. 29, 2004)	12
<u>In re Qualcomm Inc.,</u> Ser. No. 75/183,251 (T.T.A.B. May 1, 2000)	8
<u>In re Stereotaxis, Inc.,</u> 429 F.3d 1039, 77 U.S.P.Q.2d 1087 (Fed. Cir. 2005)	2
<u>In re The Stroh Brewery Co.,</u> 34 U.S.P.Q. 1796 (T.T.A.B. 1994)	8
<u>In re Waverly Inc.,</u> 27 U.S.P.Q.2d 1620 (T.T.A.B. 1993)	12
<u>Oreck Holdings, LLC v. Bissell Homecare, Inc.,</u> Opp. No. 91173831 (T.T.A.B. Feb. 16, 2010)	6, 10

Pursuant to Rule 2.142(b)(1) of the Rules of Practice in Trademark Cases, 37 C.F.R. § 2.142(b)(1), and Section 1203.02(c) of the Trademark Trial and Appeal Board Manual of Procedure, Applicant, J. Patrick Berry, hereby submits this reply brief in response to the Examining Attorney's brief, submitted on January 16, 2012, opposing Applicant's appeal to register the marks SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL ("Applicant's Marks"). Applicant respectfully requests that the Board consider this reply brief in further support of its appeal.

I. EXAMINING ATTORNEY'S BRIEF

Applicant respectfully submits that the Examining Attorney, by improperly dissecting Applicant's Marks into their component terms, has given no consideration to the marks in their entirety. This incomplete analysis has led the Examining Attorney to the incorrect conclusion that "the applied-for-marks . . . will in each case be immediately understood and perceived by consumers as describing and identifying the literary content and/or literary form featured on the audio books as specified in each mark, namely 'novella,' 'short story,' 'story,' and 'novel,' is musically scored, and rendering these marks when viewed as a whole, merely descriptive of the goods." (Ex. Atty Br. 3.)

According to the Examining Attorney, a consumer is highly likely to understand that "SCORED" indicates that Applicant's audio book products are "musically scored" because the goods are in fact musically scored (i.e., the audio books have a musical component). (See Ex. Atty Br. 5.) This musical component, the Examining Attorney reasons, is highly likely to be a major decisional factor in the consumer's determination of whether or not to purchase Applicant's audio book products. (See id.) The Examining Attorney further posits that a consumer is highly likely to encounter the term "SCORED" in the context of "musically scored"

when shopping for audio books. (See Ex. Atty Br. 6.)

The record includes evidence from the Examining Attorney, which was obtained from online dictionaries and third party websites:

- Merriam-webster.com dictionary entries for SCORE (returned when searching “SCORED”) and NOVELLA, SHORT STORY, STORY and NOVEL (see Dec. 10, 2009 Office Actions, Atts. 1-4); and
- Thirteen non-duplicative web pages reached through links returned by the Google search engine (no search terms have been identified) (see Jan. 18, 2011 Office Actions, Atts. 1-21; Feb. 5, 2011 Office Action, Atts. 1-24; Aug. 10, 2011 Office Actions, Atts. 1-7) (denying Request for Reconsideration)).

II. ARGUMENT

The Examining Attorney has not met the burden of establishing that Applicant’s Marks, when considered in their entirety, are merely descriptive of Applicant’s goods. The Examining Attorney has improperly dissected all of the marks into their component terms, and has refused registration based on the alleged descriptiveness of each of the individual components. Additionally, the refusals to register are based on mere conjectures that are unsupported by the evidence in the record. When viewed as a whole, that evidence falls far short of showing that a significant number of the relevant public, without conjecture or speculation, would immediately view the mark as merely descriptive of a significant aspect of the identified goods. See, e.g., In re Stereotaxis, Inc., 429 F.3d 1039, 1041, 77 U.S.P.Q.2d 1087, 1089 (Fed. Cir. 2005); see also TMEP § 1209.01(b). Accordingly, Applicant respectfully requests that the Board reverse the refusals to register Applicant’s Marks.

A. No Consideration Has Been Given To Applicant’s Marks In Their Entireties

The Patent and Trademark Office has long held that a composite mark consisting of merely descriptive component terms is registrable if the combination of terms creates a unitary

mark with a nondescriptive meaning, or if the composite mark has a bizarre or incongruous meaning. See, e.g., In re Colonial Stores Inc., 394 F.2d 549, 157 U.S.P.Q. 382 (C.C.P.A. 1968). However, in this case, the Examining Attorney has given no consideration whatsoever to any of Applicant's Marks when viewed as a whole. That is, there has been no analysis of the unitary marks that have been created by the combination of the component terms "SCORED," "NOVELLA", "SHORT STORY," "STORY" and "NOVEL." Rather, the Examining Attorney has improperly dissected the marks, and has refused registration on the basis of the alleged descriptiveness of all of the individual components. Even assuming for the sake of argument that the Examining Attorney has shown that each component directly and immediately describes Applicant's goods, he has not established that SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL, in their entireties, are merely descriptive.

B. Much of the Examining Attorney's Evidence Is Fundamentally Flawed

Five of the thirteen websites offered by the Examining Attorney suffer from inherent defects, and therefore offer little support for the refusals to register. The printouts from Eastwestbookshop.com, Alephbet.com, and Christianity.about.com feature lists of products available on the respective sites. (See, e.g., Jan. 18, 2011 Office Actions, Atts. 5-9; Feb. 5, 2011 Office Action, Atts. 7-12, 13-17, 18-22.) Each item in the list includes a summary of the product and a hyperlink to a page that contains more detailed information about the product. The Board has held that lists of Internet search results generally have little probative value because they fail to show the full context in which a term is used on the linked web pages. See In re Bayer Aktiengesellschaft, 488 F.3d 960, 967, 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007); cf. TBMP § 1208.03; TMEP § 710.01(b). Similarly, the product lists in the present case do not show the context within which the term "SCORED" is used on the full product pages, and therefore offers

minimal, if any, support for finding that the term “SCORED” is merely descriptive. More importantly, the Examining Attorney’s purported evidence is wholly irrelevant to the central issue here, namely, whether the composite marks are in their entireties merely descriptive of the applied-for goods.

The Examining Attorney also offers printouts from the online marketplace websites at Bonanza.com and Alibris.com. (See Aug. 10, 2011 Office Actions, Atts. 1-2, 3-5.) While the Board generally accepts probative evidence obtained from the Internet, the reliability of information obtained from online marketplace websites is highly questionable. Cf. TMEP § 710.01(b) (information obtained from Wikipedia, a secondary source of information that permits anyone to edit the entries, should be treated as having limited probative value). Online marketplace websites permit any purported seller to post potentially erroneous information about a product, and it is difficult—if not impossible—to determine, on its face, the identity of the author, or whether the information is accurate. It is certainly plausible that the evidence here features content written by an individual outside of the audio book industry who does not have the same perception of the term as the relevant consumers. Therefore, this evidence should be afforded little, if any, probative value.

C. The Evidence Does Not Prove That Applicant’s Goods Are “Musically Scored” Or That Consumers Immediately Perceive That Applicant’s Marks Are “Musically Scored”

As an initial matter, the marks at issue are SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL, not “musically scored novella,” “musically scored short story,” “musically scored story” and “musically scored novel.” Still, the Examining Attorney’s evidence only shows use of the composite wording “musically scored.” If the term “SCORED” were merely descriptive, as the Examining Attorney maintains, it would not be

necessary to use the adverb “musically” to clarify what is meant by the term “SCORED.” That the website evidence solely illustrates use of the composite wording “musically scored” only confirms that Applicant’s Marks are, at the very least, suggestive.

Applicant disagrees with the Examining Attorney’s characterization that Applicant’s goods “are in fact musically scored.” (See Ex. Atty Br. 6.) Rather, Applicant understands the terminology “musically scored” as applying only in the context of works involving some element of theatrical or visual performance. Certainly, products are not referred to as “musically scored” simply because they have a musical component. Toys that play music or musical jewelry boxes are not advertised or understood to be “musically scored.” Further, the Examining Attorney has not identified any evidence that even infers, let alone proves, his claim that the “musically scored” feature of an audio book (or lack thereof) is highly likely to be a major decisional factor in the consumer’s decision of whether or not to purchase Applicant’s audio book products. The Examining Attorney’s position in this regard is based on argument and supposition rather than evidence.

1. Dictionary Definitions Illustrate That “SCORED,” Even When Applied to Music, Relates to Works Involving an Element of Theatrical or Visual Performance

The dictionary definitions of record illustrate that the term “score” has numerous definitions, including those related to sports, competition, accounting and music. When considered in the specific context of music, the dictionary definitions for the term “score” proffered by the Examining Attorney illustrate that such term can mean “to write or arrange (music) for a specific performance medium,” “to make an orchestration of,” “to compose a score for (a movie).” (See Dec. 10, 2009 Office Actions, Att. 1.) However, Applicant’s dictionary definitions confirm that the term can also refer to “a written or printed piece of music with all the

vocal and instrumental parts arranged on staves, one under the other,” “the music itself,” “the music played as background to or part of a movie, play, or television presentation,” “the notation of a musical work,” the written form of a composition for orchestral or vocal parts,” “the music written for a film or a play,” “to orchestrate” or “to arrange for a specific instrument.” (See June 5, 2010 Responses to Office Action, Ex. 1 at 1, 4-7.)

In the music context, a “score” may refer to the background music of a movie, play, or television presentation, or the act of writing or arranging music for a specific performance medium. However, the definitions in the record make no mention of audio books (or audio works), literary works, or anything other than works involving some element of theatrical or visual performance. This evidence does not prove that Applicant’s goods are “musically scored,” or that audio book consumers understand the term “SCORED” to mean “musically scored.” Even assuming that Applicant’s Marks are informational, this is certainly not fatal; consumers may be informed by suggestion, as well as description. See Oreck Holdings, LLC v. Bissell Homecare, Inc., Opp. No. 91173831, at *22 (T.T.A.B. Feb. 16, 2010), <http://des.uspto.gov/Foia/ReterivePdf?flNm=91173831-02-16-2010&system=TTABIS>. While the term “SCORED” may perhaps suggest a characteristic or feature of Applicant’s goods, it certainly does not immediately and directly merely describe such characteristic/feature.

The use of “SCORED” creates an incongruity as applied to audio books, based, in part, on the essential differences between works involving an element of a theatrical or visual performance and audio books. See In re Las Nuevas Fabricas, S.A. de C.V., Ser. No. 77/193,535, at *7 (T.T.A.B. May 19, 2009), <http://des.uspto.gov/Foia/ReterivePdf?flNm=77193535-05-19-2009&system=TTABIS> (department store and factory outlet were essentially different, requiring purchasers to take an extra mental step to determine the significance of

“factories” in connection with department store services). A consumer could possibly perceive that the “score” of a theatrical or visual performance refers to the musical component of that work. Oftentimes, the score of a theatrical or visual performance is distributed separately for sale on a CD (e.g., a movie soundtrack). Listening to an audio book, on the other hand, is a purely aural experience. Publishers are not commonly known to distribute CDs that feature only the musical component of an audio book. Therefore, even if a consumer understands that the “score” of a movie, play, or TV program refers to its musical component, the consumer will not necessarily understand the term in exactly the same way in the context of audio books.

**2. Website Evidence Shows Use of “SCORED”
In Connection With a Variety of Unrelated Products**

Most of the websites submitted by the Examining Attorney, i.e., eight of the thirteen websites, show use of the composite wording “musically scored” in connection with numerous products unrelated to those identified in the applications-at-issue, including: a DVD featuring a photo compilation (Jan. 18, 2011 Office Actions, Att. 2), what appears to be a CD featuring a guided meditation (based on a truncated search result) (*id.* Att. 5), a DVD featuring a documentary (*id.* Att. 11), a live theatrical performance (*id.* Att. 12), a multimedia software application for a mobile handheld device (*id.* Att. 17), a public radio show broadcasting a theatrical performance (*id.* Att. 20), musical compositions for motion picture films (Feb. 5, 2011 Office Action, Att. 2), what appears to be a reference to a play (based on a truncated search result) (*id.* Att. 9), and a software program featuring digital animations (*id.* Att. 14). Indeed, this evidence merely shows use of the composite wording “musically scored” in connection with works of various works involving an element of theatrical or visual performance.

This evidence has very little, if any, probative value to support the contention that Applicant’s Marks, as applied to audio books, are descriptive, notwithstanding the fact that some

relationship conceivably may exist between these goods. See, e.g., In re King Koil Licensing Co., 79 U.S.P.Q.2d 1048, 1052 (T.T.A.B. 2006) (use of “breathable” for clothing is probative of its likely meaning to consumers when used in connection with fabric or clothing, but is less probative of its meaning as applied to mattresses); In re Elgin Sweeper Co., Ser. No. 77/193,259, at *2 (T.T.A.B. Mar. 26, 2009), <http://des.uspto.gov/Foia/ReterivePdf?flNm=77193259-03-26-2009&system=TTABIS> (evidence that “memory sweep” describes removing old information from computer system memory cache is inapplicable to electronic control system devices); In re Qualcomm Inc., Ser. No. 75/183,251, at *6 (T.T.A.B. May 1, 2000), <http://des.uspto.gov/Foia/ReterivePdf?flNm=75183251-05-012000&system=TTABIS> (that “pure voice” is understood to refer to a “voice-only” network does not establish its descriptiveness of speech coding technology embedded in digital wireless communications products); In re The Stroh Brewery Co., 34 U.S.P.Q. 1796, 1797 (T.T.A.B. 1994) (that “virgin” is descriptive of cocktails does not prove that it is descriptive of non-alcoholic malt beverages).

3. Website Evidence of “SCORED” Used In Connection With Audio Books Is Minimal And Has Little, If Any, Probative Value

With the millions of websites from which to choose, the Examining Attorney’s evidence includes only four instances showing use of the term “SCORED” in connection with audio books, none of which present the term “SCORED” alone or without use of the preceding term, “musically.” (See Feb. 5, 2011 Office Action, Att. 4; Aug. 10, 2011 Office Actions, Atts. 1-2, 3-5, 6-7.) Indeed, none of this evidence shows use of the terms actually applied for by Applicant, namely, SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL. Instead, all of the evidence shows use of the composite wording “musically scored.” Because this evidence relates to completely different wording than the applied-for marks, it is wholly incapable of establishing that Applicant’s unitary composite marks are descriptive in

connection with Applicant's goods.

In addition, most of this very limited evidence features audio books that likely have been discontinued for some time, and are now being resold on online marketplaces (See Aug. 10, 2011 Office Actions, Atts. 1-2, 3-5, 6-7.) These audio books were published at least as early as 1995 in cassette format, and some do not even have product images that consumers can view. Additionally, all of these products were published by the very same publisher, namely, Dove Audio. Therefore, this evidence, if it shows anything, only shows how one publisher, many years ago, may have advertised three audio books using "musically scored," a term that is irrelevant to Applicant's Marks. It certainly is not indicative of the practices and understandings of an entire industry.

These serious evidentiary defects continue with the Examining Attorney's evidence obtained from the website at Astory4u.com. (See Feb. 5, 2011 Office Action, Att. 4.) That website features a book and accompanying CD that contains "musically scored versions" of the literary content presented in the book. Applicant notes, however, that the copyright notice on the web page has not been updated since 2009. Still, even if the website is currently maintained, this evidence is insufficient to support a finding that "SCORED" alone (without the accompanying term "musically") is merely descriptive of Applicant's audio books, much less that the applied-for marks "SCORED NOVELLA," "SCORED SHORT STORY," "SCORED STORY" or "SCORED NOVEL" are merely descriptive.

**D. Evidence of Record Does Not Establish That "NOVELLA,"
"SHORT STORY," "STORY" and "NOVEL" Are Descriptive**

As discussed at the outset, the Examining Attorney has given no consideration to Applicant's Marks as a whole. Yet, the Examining Attorney has concluded that the improperly dissected terms "SCORED," "NOVELLA," "SHORT STORY," "STORY" and "NOVEL" are

descriptive of Applicant's goods. Therefore, regardless of whether the Examining Attorney has sufficiently shown that these components are descriptive, he has failed to establish that Applicant's Marks as a whole are merely descriptive.

Contrary to the Examining Attorney's claims, Applicant does not concede that the terms "NOVELLA", "SHORT STORY," "STORY" and "NOVEL" are descriptive of the applied-for goods. Instead, Applicant's arguments have properly focused on Applicant's Marks in their entirety. Applicant maintains that, when viewed as a whole, Applicant's marks do not immediately describe the applied-for goods. "NOVELLA," "SHORT STORY," "STORY" and "NOVEL" may offer some information about Applicant's products, but this does not render them descriptive. See Oreck Holdings, supra, at *22 ("It is not fatal that a mark is informational. One may be informed by suggestion as well as by description."). In fact, the dictionary definitions in the record further illustrate that the terms, even standing alone, do not directly describe Applicant's goods.

For example, "STORY" (see Dec. 10, 2009 Office Actions, Att. 1-2), by its definition, is an indirect, vague term that creates indirect mental associations in the consumer's mind rather than directly telling the consumer anything specific. An audio book purchaser may perceive the term "STORY" to refer to a historical account, a current news broadcast, or a statement of pertinent facts about an event. Alternatively, the term may connote a fictional tale, a romance, or a legend.

Similarly, the term "NOVEL" (see Dec. 10, 2009 Office Actions, Att. 1) has multiple meanings. Consumers may understand the term to mean "new," or that it refers to an original or striking style. "NOVEL" may also be considered by consumers to indicate a broad literary genre consisting of fictional works. Or, the term may identify a specific prose narrative that is

characterized as a long and complex sequence of events and dealing with human experience.

Further, a prospective purchaser may understand the terms “NOVELLA,” “SHORT STORY,” “NOVEL” and “STORY” to connote written works about fictional characters and imaginary events. However, such terms do not immediately describe pre-recorded CDs, audio cassettes and downloadable e-books, or even fictional as well as non-fictional spoken narrative.

E. The Combination of Terms in Applicant’s Marks Creates Incongruity

In view of the foregoing, the Examining Attorney has not established that any of the components in Applicant’s Marks are descriptive of Applicant’s audio book products. More critically, the Examining Attorney has also failed to demonstrate, by evidence or otherwise, that the composite marks that are the subjects of Applications are merely descriptive of audio books.

Indeed, the term “SCORED,” when combined with “NOVELLA,” “SHORT STORY,” “STORY” or “NOVEL” creates an incongruous or unusual composite mark. Such incongruity is based, in part, on the essential differences between works involving an element of a theatrical or visual performance and audio books. See In re Las Nuevas Fabricas, S.A. de C.V., supra, at *7. Assuming for the sake of argument that a consumer recognizes that “NOVELLA,” “SHORT STORY,” “STORY” or “NOVEL” refers to a written literary work, the consumer will still perceive that the composite terms “SCORED NOVELLA,” “SCORED SHORT STORY,” “SCORED STORY” and “SCORED NOVEL,” as applied to Applicant’s audio books, are unusual in view of their understanding of the separate components. Therefore, the consumer must exercise imagination, thought or perception to resolve these incongruities and to reach a conclusion as to the nature of Applicant’s audio books. Neither the Examining Attorney’s arguments nor the evidence in the record have established otherwise. Indeed, that the Examining Attorney was unable to cite a single use of any of the composite marks is telling and supports

registration; if the composite marks are in fact merely descriptive, one would logically expect there to be some prior use for competitive goods.

In sum, the arguments and evidence submitted by the Examining Attorney fall far short of demonstrating that Applicant's Marks merely describe a significant feature or characteristic of Applicant's proposed goods. The Examining Attorney, at best, has offered no more than a scintilla of evidence to support his arguments. Such a showing is insufficient to sustain the refusals to register Applicant's Marks. In re Oldcastle Glass, Inc., Ser. No. 76/372,028, at *5 (T.T.A.B. Apr. 29, 2004), <http://des.uspto.gov/Foia/RetrievePdf?flNm=76372028-04-29-2004&system=TTABIS> (Examining Attorney "must at least establish at a reasonable predicate for a descriptiveness refusal, based on substantial evidence, i.e., more than a scintilla of evidence").

F. Any Doubt Should Be Resolved in Applicant's Favor

It is well settled policy that the Patent and Trademark Office resolve any doubt with respect to the issue of descriptiveness in Applicant's favor. See, e.g., In re Grand Metro. Foodservice, Inc., 30 U.S.P.Q.2d. 1974 1976 (T.T.A.B. 1994). The Board, too, resolves doubt in favor of the applicant and by approving the mark for publication:

Our decision is assisted by the fact that we have no information that anyone will be damaged by the registration of the mark but that anyone who would be injured will have an opportunity to file a notice of opposition and to develop a factual record upon which any question of descriptiveness could be adjudicated with more confidence than it can be on the basis of a priori assumptions.

In re Waverly Inc., 27 U.S.P.Q.2d 1620, 1624 (T.T.A.B. 1993) (citing In re Distrib. Codes, Inc., 199 U.S.P.Q. 508, 511 (T.T.A.B. 1978)); see also 2 McCarthy, supra, § 11:51 at 11-97 ("Because the line between merely descriptive and only suggestive terms is 'so nebulous,' the Trademark Board takes the position that doubt is resolved in favor of the applicant on the assumption that

competitors have the opportunity to oppose the registration once published and to present evidence which is usually not present in ex parte examination.”).

In the present case, it is reasonable and fair for the Board to reverse the refusals to register the marks SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL on the basis that the Examining Attorney has failed to meet the burden of proving that the marks, when considered in their entireties, are merely descriptive as used in connection with the applied-for goods.

III. CONCLUSION

In light of the foregoing, Applicant respectfully requests that the Board reverse the Examining Attorney’s refusals to register Applicant’s Marks, SCORED NOVELLA, SCORED SHORT STORY, SCORED STORY and SCORED NOVEL, and approve the applications for publication.

Respectfully submitted,

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Dated: February 6, 2012

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